

Department of Commerce

Inquiry on Copyright Policy, Creativity, and Innovation in the Internet Economy

Docket No. 100910448-0448-01

Comments of EDUCAUSE

December 10, 2010

EDUCAUSE provides this filing in response to the above-cited inquiry on copyright policy. In March of this year, EDUCAUSE submitted a response to a Request for Public Comment from the Intellectual Property Enforcement Coordinator with respect to educational institutions' "efforts...to reduce or eliminate illegal downloading over their networks". That response is attached, and this filing serves as an update and augmentation of our earlier comments.

As described in the attached filing, EDUCAUSE is a non-profit association of over 2,200 educational institutions representing the interests of the IT professionals on college and university campuses. It is our community that installs and operates campus networks and manages them to be as cost-effective as possible. That same community therefore takes careful note of how those networks are used and deploys technologies and policies to ensure appropriate operation of these vital resources.

Our earlier filing highlighted the pending July 1 deadline for compliance by all U.S. colleges and universities with anti-infringement provisions of the Higher Education Opportunity Act of 2008 (HEOA). We mentioned a number of ways that EDUCAUSE would be engaged in facilitating that compliance, including gathering compliance details from "role-model campuses" of varying sizes and categories. The list¹ of role models currently comprises twelve colleges and universities:

- Baylor University
- Bowling Green State University
- Cornell University
- Illinois State University
- Pomona College
- Purdue University (in preparation)

¹ <http://www.educause.edu/HEOArrolemodels>

- Reed College
- South Texas College
- Texas State University-San Marcos
- Touro University Nevada (in preparation)
- University of California, Los Angeles
- University of Delaware

The role-model approach to compliance is particularly appropriate, as opposed to a single prescriptive standard, because, as specified by Congress and the Department of Education, colleges and universities have a great deal of flexibility in determining how they will comply with the HEOA. Compliance strategies will also change as technology and business models evolve and as experience accrues. There is thus no one-size-fits-all option, now or in the future. The role-model case studies provide examples of a range of choices that disparate campuses are finding effective, which choices may then help inform peer institutions. We have, in fact, received a number of reports that just this behavior is taking place, with campuses adopting policies and procedures found effective elsewhere. Further, a recent letter² sent by the Motion Picture Association of America to the presidents of all U.S. colleges and universities recommended that institutions looking for guidance refer to the EDUCAUSE list of role models.

The role-model collection is intended to be neither comprehensive nor statistically representative, but the current and evolving examples of HEOA compliance choices should be extremely helpful to the goals of the current Department of Commerce inquiry. EDUCAUSE would be happy to work with the Department on an ongoing basis to help analyze campus experiences and apply them to the difficult questions of balancing needs among stakeholders. We offer here brief summaries of approaches based on the current set of role models in four areas:

Technology-based deterrents. The HEOA requires all campuses to develop and implement a written plan, employing one or more technology-based deterrents, to effectively combat the unauthorized distribution of copyrighted material by users of the institution's network. HEOA regulations recognized four categories of technology-based deterrents:

² <http://net.educause.edu/ir/library/pdf/CSD5976.pdf>

- (1) Bandwidth shaping
- (2) Traffic monitoring
- (3) Accepting and responding to DMCA notices
- (4) Commercial products designed to reduce or block illegal file sharing

Of the 12 current role models, nearly all have deployed option (1), bandwidth shaping, as well as option (3), responding to DMCA notices, with at least one example of each of the other options.

Dealing with cases of infringement. The HEOA requires all campuses to notify their communities annually of the policies and procedures governing cases of copyright infringement. All of the role models describe detailed disciplinary procedures, most with graduated penalties. Among the more innovative approaches are an automated “quarantine” process at UCLA and an Illinois State policy that allows access to file-sharing protocols only upon special request, with carefully crafted punishment for those abusing the privilege.

Periodic review. All colleges and universities must periodically review their compliance plans based on “relevant assessment criteria”. Most of the current role-model campuses include in their review an assessment of the community’s awareness of copyright law and institutional copyright policy, in many cases by use of formal surveys. Others take note of the number of DMCA notices received, although this criterion is becoming ever more problematic due to lack of uniformity of notification practices within the rights-holder community. For example, in early September of this year, many campuses reported a spike in DMCA notices from the Recording Industry Association of America, in some cases representing a week-to-week increase of an order of magnitude. Seasonal activity fluctuations on college campuses are instinctively recognized by all staff, and it was clear that the cause lay elsewhere. In response to an inquiry from EDUCAUSE, the RIAA determined that a technical error had led to the anomaly. More recently, the Motion Picture Association of America announced that it would soon begin sending DMCA notices of its own, in addition to those coming from its member organizations and studios, which will inevitably lead to a new notification pattern. In

addition, press reports³ have highlighted questionable notification practices on the part of certain rights-holder representatives. These observations are not meant to minimize the amount of infringing activity taking place (although, as noted by the General Accounting Office⁴, there is almost no objective measure of this amount) nor to assert that a large portion of DMCA notices are erroneous (although here, too, the statistics are in question⁵), but simply to point out that year-to-year or campus-to-campus numeric comparisons of even valid DMCA notices are of little use due to a wide range of uncontrolled variables.

Community education. Colleges and universities are by their very nature creative and energetic in the delivery of education, and so it is not surprising that our role-model campuses deploy an extremely wide variety of intriguing approaches to the HEOA compliance mandate to education their communities about copyright. This example from Purdue – not yet posted – makes the point:

For many years, we have used a layered approach to educating the Purdue community about copyright infringement. Our educational materials include:

- Whenever a user logs into University IT resources, he or she must affirmatively agree to proper use of the equipment in accordance with University policies. Those policies require users to respect the intellectual property rights of others and refrain from copyright infringement.
- A permanent copyrighted materials notice posted on the University's SecurePurdue website, and is available at: <http://www.purdue.edu/securepurdue/copyright.cfm>.
- Our Housing and Food Services group prepared an illegal downloading video (Amber video) posted on SecurePurdue webpage. It is also available at: <http://www.housing.purdue.edu/assets/video/recordingindustry/recordingindustry.htm>
- University Copyright Office, "A Guide to Copyright, Issues in Higher Education" brochure, provides a section on "Copyright in Cyberspace."
- Anti-piracy bookmarks are distributed each year to incoming students during new student orientation.

³ See, e.g., "Thousands Dropped From 'Copyright Trolling' Lawsuit" at <http://www.pcmag.com/article2/0,2817,2374035,00.asp> and "High-Profile, High Damages File-Sharing 'Conviction' Was a Farce" at <http://www.libertyvoice.net/2010-09/high-profile-high-damages-file-sharing-conviction-was-a-farce/>

⁴ See "Federal Researchers Point to Problems With Piracy Numbers" at <http://www.publicknowledge.org/node/3003>

⁵ See "The Inexact Science Behind D.M.C.A. Takedown Notices" at <http://bits.blogs.nytimes.com/2008/06/05/the-inexact-science-behind-dmca-takedown-notices/>

- Television ads warning students against copyright infringement are featured regularly on Purdue BoilerTV.
- Anti-piracy posters are distributed to Residence Halls. They talk about file sharing, downloading, etc. They are available on the ResNet Web site at <http://www.itap.purdue.edu/resnet/support/posterArchive.cfm>

**REQUEST OF THE INTELLECTUAL PROPERTY ENFORCEMENT
COORDINATOR FOR PUBLIC COMMENT ON THE JOINT STRATEGIC
PLAN**

COMMENTS OF EDUCAUSE

EDUCAUSE submits these comments in response to Part II, Supplemental Comment Topic 16, of the IPEC Request for Public Comment:

Discuss the effectiveness of recent efforts by educational institutions to reduce or eliminate illegal downloading over their networks. Submissions should include recent specific examples.

EDUCAUSE is a non-profit association of over 2,200 colleges and universities. We represent the interests of the IT professionals on campus from chief information officers (CIOs) to the professionals who keep networks operating on a day-to-day basis. Our community is intimately acquainted with the issues surrounding the topic at hand. We take the problem seriously and have for years developed and deployed creative, aggressive, and responsive approaches, at considerable cost of time and money, consistent with the research, instruction, and public-service needs of our campus technology systems. We are pleased to be able to share these brief comments and observations, and would welcome the opportunity to work with the IPEC on the elements of the Joint Strategic Plan that impact or implicate college and university networks.

The IPEC inquiry is timely because of the recent passage and upcoming effective date of the Higher Education Opportunity Act of 2008 (HEOA). As noted below, beginning July 1, 2010, all colleges and universities will be required by the U. S. Department of Education to implement “plans to effectively combat the unauthorized distribution of copyrighted material by users of the institution’s network.” Among other requirements, these plans must include one or more “technology-based deterrents” and must be periodically reviewed using “relevant assessment criteria.” The implementation and assessment of these plans by thousands of institutions over a period of years should provide useful input to the IPEC on approaches that are and are not effective as technologies, applications, and culture evolve.

We begin our comments with some observations regarding the relationship of campus networks to the problem of unauthorized content distribution.

- When Napster, the first peer-to-peer (P2P) file-sharing system, was developed in 1999¹, campus networks did represent a disproportionate amount of the country's high-speed network capacity. Since then, however, the expansion of residential broadband has been explosive², and campuses no longer constitute a uniquely powerful conduit to the Internet. This trend will only accelerate as efforts such as the Federal Communications Commission National Broadband Plan take effect.
- The amount of infringing activity on campus networks has been drastically overstated. In one well-known incident³, the Motion Picture Association of America (MPAA) commissioned a study reporting that 44% of its losses were attributable to college and university networks. The MPAA subsequently discovered an error and adjusted the figure to 15%. Further examination of the data and methodology, however, revealed that the 15% figure referred to college and university *students*, not campus networks. In fact, under 20% of college and university students live on campus⁴. To the extent that the MPAA study is otherwise valid, the loss attributable to campus networks is thus 3%.
- Every campus administrator knows that students' file-sharing habits are well-established before their freshman year in college. Research sponsored by the Digital Citizen Project⁵ at Illinois State University indicates that the use of P2P file-sharing starts as early as sixth grade.
- Peer-to-peer network technology is used to distribute a variety of instructional and research material, including content from NASA⁶. Commercial use of P2P technology for distribution of video content is

¹ Sarah Riedel, "A Brief History of Filesharing", Feb. 24, 2008, available at

http://www.associatedcontent.com/article/20644/a_brief_history_of_filesharing_from.html.

² FCC: *Broadband Adoption and Use in America*, Pew Internet and American Life Project, Feb. 23, 2010.

³ Mike Nizza, "Movie Industry Admits It Overstated Piracy on Campus", *N.Y. Times*, Jan. 23, 2008, available at <http://thelede.blogs.nytimes.com/2008/01/23/movie-industry-admits-it-overstated-piracy-on-campus/>.

⁴ "National Retail Federation 2009 Back-to-School and Back-to-College Surveys", available at http://www.nrf.com/modules.php?name=News&op=viewlive&sp_id=756.

⁵ Testimony of Professor Cheryl Asper Elzy before the Science and Technology Committee, U. S. House of Representatives, June 5, 2007, p.9.

⁶ NASA's "Visible Earth" project, available at <http://visibleearth.nasa.gov/faq.php>.

under way and increasing⁷, and P2P was even used by CNN to distribute the live stream of President Obama's inaugural.⁸

Notwithstanding these observations, colleges and universities have been working hard for years to minimize the use of their networks for the unauthorized distribution of copyrighted material. Campuses are in the teaching business. They conduct orientation lectures; distribute posters, flyers, and videos; send out physical and electronic notices; mandate completion of tests and quizzes; and employ a wide variety of other mechanisms to explain what copyright is and the penalties for infringement, information most students are hearing for the first time. In addition to instruction, the annual EDUCAUSE Core Data Survey⁹ indicates that the use of "bandwidth shaping" – one of the "technology-based deterrents" specified by the HEOA – is nearly universal. Further, data from the Campus Computing Project's annual survey of college and university CIOs¹⁰ show that 88% of campuses have policies to address inappropriate downloading of copyrighted content and nearly 90% of campuses have policies by which students can lose their network privileges for P2P violations. Across all institutions, direct annual costs associated with combating infringement average almost \$37,000, reaching \$68,000 at large public institutions. Extending the accounting to include indirect costs can raise the figure to a quarter of a million dollars or more¹¹.

The HEOA, which was signed into law by President Bush in August, 2008, included requirements that U. S. campuses take steps to deal with copyright infringement on their networks. The U. S. Department of Education initiated a Negotiated Rulemaking process which, in October, 2009, established the HEOA compliance rules. Campuses have three primary requirements:

- (a) Develop and implement a written plan to effectively combat the unauthorized distribution of copyrighted material by users of the

⁷ "Peer-to-Peer: Commercial Uses" available at http://itlaw.wikia.com/wiki/Peer-to-peer#Commercial_Uses.

⁸ "Watch CNN.com Live Video, Share Your Computer With CNN", *Huffington Post*, Feb. 5, 2009 available at http://www.huffingtonpost.com/2009/02/05/watch-cnncom-live-video-s_n_164201.html.

⁹ EDUCAUSE Core Data Survey, available thru <http://net.educause.edu/apps/coredata/>.

¹⁰ Kenneth C. Green, *Campus Computing 2009*, December 2009, available thru www.campuscomputing.net.

¹¹ Kenneth C. Green, *The Campus Costs of P2P Compliance*, October, 2008, available thru www.campuscomputing.net.

institution's network, without unduly interfering with educational and research use of the network. Each plan must be periodically reviewed using "relevant assessment criteria", and must employ one or more "technology-based deterrents", including (i) bandwidth shaping, (ii) traffic monitoring, (iii) accepting and responding to DMCA notices, and (iv) commercial products designed to reduce or block illegal file sharing.

- (b) Periodically review legal alternatives for acquiring copyrighted material, make the results of that review available to the community, and, to the extent practicable, offer those legal alternatives to the community.
- (c) Provide the community annually with information summarizing copyright law and documenting institutional policies and procedures for dealing with the unauthorized distribution of copyrighted material.

These regulations exist in an environment of great variation and of rapid change.

The regulations take pains to recognize the wide variation among campuses:

No particular technology measures are favored or required for inclusion in an institution's plans, and each institution retains the authority to determine what its particular plans for compliance ... will be, including those that prohibit content monitoring.

The Manager's Report accompanying the HEOA makes this note of changing technology:

Rapid advances in information technology mean that new products and techniques are continually emerging. Technologies that are promising today may be obsolete a year from now and new products that are not even on the drawing board may, at some point in the not too distant future, prove highly effective. The Conferees intend that this Section be interpreted to be technology neutral and not imply that any particular technology measures are favored or required for inclusion in an institution's plans. ... The Conferees recognize that there is a broad range of possibilities that exist for institutions to consider in developing plans for purposes of complying with this Section.

Throughout the legislative, regulatory, and implementation process, EDUCAUSE has worked with all parties to help our community plan for and comply with the HEOA, offering a series of workshops, an extensive online resource center, a comprehensive list

of legal sources of online content, and links to compliance information for a selection of representative and role-model campuses¹². EDUCAUSE plans to remain engaged, and is prepared to work with the IPEC on related activities.

Although we do not yet have the experience and analysis that will emerge from implementation of the HEOA, we respond to the IPEC request for “specific examples” with three. They are chosen because they represent thoughtful selections of differing methodologies across a spectrum of campuses. In all cases, the cited references will lead to a great deal of additional detail.

1. UCLA’s “Creating a Culture of Change” approach to illegal file-sharing, through education, discipline, and the promotion of legal alternatives.¹³
2. The BAYU (“Be Aware You’re Uploading”) program at the University of Michigan, combining technology and education while not interfering with transmission of content.¹⁴
3. The Illinois State University Digital Citizen project, featuring extensive student surveys and implementation and evaluation of a variety of policies and technologies.¹⁵

¹² <http://www.educause.edu/HEOA>.

¹³ <http://oit.ucla.edu/policy/illegalfilesharing/documents/jd-testimony-20070308.pdf>.

¹⁴ <http://www.bayu.umich.edu>.

¹⁵ <http://digitalcitizen.illinoisstate.edu>.